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Supreme Court, U.S.
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CASE NO. _____

Supreme Court of The United States

October Term 1987

OSCAR LOPEZ JIMENEZ,

Petiitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of The United States

October Term, 1987

No. . . . . .

OSCAR LOPEZ JIMENEZ,
PETITIONER
vs.
UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

I.

THAT THE COURT'S REFUSAL TO ALLOW PETITIONER A HEARING AND A FAIR AND REASONABLE OPPORTUNITY TO DEMONSTRATE "CAUSE AND PREJUDICE" AS PER THE DECISION IN **WAINWRIGHT V. SYKES,** 433 U.S. 72 (1977), HAS EFFECTIVELY DENIED PETITIONER HIS CONSTITUTIONAL RIGHT TO FEDERAL HABEAS CORPUS RELIEF.

LIST OF PARTIES

The following is a list of all parties to the proceeding involved in the United States Court of appeal's judgement as herein sought to be reviewed:

1.) Oscar Lopez Jimenez, Petitioner,

2.) Ruben Montemayor and Harry A. Nass, Jr., counsel for Petitioner,

3.) The United States of America, Respondent.

CITATIONS TO OPINIONS BELOW

On May 28, 1987, a per curiam opinion was rendered on the Summary Calendar of the United States Court of Appeals for the Fifth Circuit affirming the opinion of the United States District Court for the Western District of Texas, San Antonio, Division. The Petition for Rehearing before the United States Court of Appeals for the Fifth Circuit was denied per curiam on June 29, 1987. The opinions are appended hereto as Appendix A. and Appendix B, respectively.

JURISDICTION

The date of the decision rendered by the United States Court of Appeals for the Fifth Circuit on Petitioner, Oscar Lopez Jimenez's Petition for Rehearing is June 29, 1987.

The statutory provision conferring on this Court jurisdiction to review the decision in question by writ of certiorari is under 28 United States Code, Section 1252.

STATEMENT OF THE CASE

Mr. Raul Perez, Jr., a drug enforcement Agent, testified that he had an occasion to meet the co-defendant, Faustino Alvarez, in Eagle Pass, Texas on or about the 31st day of January 1984. At this time, he had contacted Mr. Alvarez for the purpose of purchasing heroin. Mr. Alvarez informed Mr. Perez that he had no source for heroin at the moment, but that he could get a supply of cocaine. Arrangements were made to meet at a McDonald's located on the main street of Eagle Pass, Texas once either controlled substance was obtained for sale. At about 7:10 p.m. a late model blue and white Ford Supercab pickup arrived at the fast-food store and parked in front of Agent Perez' vehicle. Inside the vehicle were Mr. Alvarez and Appellant, Oscar Lopez-Jimenez,the owner of the vehicle. Agent Perez negotiated a deal for cocaine solely with Mr. Alvarez, and outside the presence of Appellant, after which Appellant and Alvarez departed. Alvarez returned in twenty minutes with the purchase material without Appellant, and in a different vehicle. Agent Perez paid, and the meeting terminated.

On February 29, 1984, Agent Perez approached Mr. Alvarez for

a second purchase of cocaine, and arrangements were made to meet at a mall near the bar at which Alvarez worked. Again, Mr. Alvarez met Agent Perez, and the latter got into Alvarez' vehicle to make the exchange of a white powdery substance and the money.

Under Cross examination, Agent Perez admitted he never dealt personally with Appellant Lopez-Jimenez and further, that no fingerprints were garnered from the plastic packages alleged to contain cocaine.

Mr. Faustino Alvarez testified secondly in this cause, and admitted under oath that he entered a plea of quilty for conspiracy in this cause. This co-defendant testified he got the cocaine from Appellant on the January 31, 1984 date. Further, that he sold the quarter ounce of cocaine, and the ounce the subject of the second alleged sale for appellant and was paid from the proceeds. Alvarez admitted under cross examination that he had known Appellant for between fourteen months and eighteen months. He further said that in all the time he knew him, he had no drug transactions with him other than those alleged in these proceedings.

Homer Galindo, a member of the Eagle Pass Police Department was the next to testify on behalf of the government. Galindo had been part of the surveillance team observing the McDonald's restaurant during the alleged drug transactions in question. Galindo admits he never observed Appellant with any kind of drugs nor did he witness him receiving any money from anybody during the dates in question.

William McDonald, an agent with Drug Enforcement, was called as the next witness, and testified he was also on surveillance during the times in question. he, too, testified he had never observed Appellant with cocaine or with money during the observation times involved.

Gerald Courtney, still another Drug Enforcement Administration agent, testified next for the government and stated he was observing the address of Appellant. On February 29, 1984, Courtney noticed Alvarez go into Appellant's house, between the time of the contact between Alvarez and Perez and the time Alvarez delivered the quantity of cocaine.

Joseph Prall, an employee and forensic chemist with the South

Central Laboratory of the Drug Enforcement Admistration, testified next. His testimony basically consisted of the test results on the alleged cocaine received from the Eagle Pass agents after the transaction in question.

Ed Albers with the Drug Enforcement Administration testified next for the government. He, too, was a forensic chemist who tested the other package of cocaine allegedly obtained in the drug transactions in question. Basically, his testimony consisted of the results of the alleged cocaine received from the Eagle Pass agents confirming the percentage cocaine contained in the submitted package.

1. ISSUES PRESENTED

THAT THE COURT'S REFUSAL TO ALLOW PETITIONER A HEARING AND A FAIR AND REASONABLE OPPORTUNITY TO DEMONSTRATE "CAUSE AND PREJUDICE" AS PER THE DECISION IN WAINWRIGHT V. SYKES, 433 U.S. 72 (1977), HAS EFFECTIVELY DENIED PETITIONER HIS CONSTITUTIONAL RIGHT TO FEDERAL HABEAS CORPUS RELIEF.

ARGUMENT

Appellant contends that he was convicted upon untrue and perjured testimony of the co-defendant in this cause and that there was insufficient evidence as a matter of law to convict him. Further, that the government knowingly used the perjured testimony and failed to provide testimony about same which would have been favorable to Appellant's defense. "Cause and prejudice" exist from the constitutional violations levelled at Appellant at the trial level such as to warrant a granting of a collateral review of the District Court decision under 28 U.S.C. Sec. 2255. Petitioner has been denied a fair and reasonable opportunity to demonstrate this "cause and prejudice" due to the courts' refusal to allow a hearing thereon.

Appellant submits that the conviction obtained against him was had through the use of perjured testimony by the co-defendant, FAUSTINO MARTINEZ ALVAREZ. If the government know-

ingly utilized perjured testimony, then Appellant is entitled to relief under 28 U.S.C. Sec. 2255. **Hart v. United states,** 565 F. 2d 360 (C.A.5, 1978). **See also United States v. Barklas,** 292 F. 2d 743 (C.A. 2, 1961) (prosecution could not have been telling the truth and the United States Attorney knew this at the time of the indictment and trial, and this is proper basis for Sec. 2255). Since it has been shown that the government knowingly used perjured testimony and that certain testimony of the co-defendant herein was false and used by the government, then a prima facie case has been demonstrated by Appellant, and therefore, relief should be granted by way of vacating the conviction had against Appellant.

Wainright V. Sykes, 433 U.S. 72 (1977) contains language by the Supreme Court of the United States holding that a prisoner seeking habeas corpus relief must satisfy a "cause and prejudice" test in order to justify collateral attack on a conviction (s) based on constitutional issues not raised at the trial level. **See also Francis v. Henderson,** 425 U.S. 536 (1976) (state prisoner could not challenge state conviction in federal habeas corpus proceeding without making showing of both "cause" for the failure and "actual prejudice,"); **Davis v. United States,** 411 U.S. 233 (1973) (federal prisoner's application for federal habeas corpus relief barred absent a showing of case for noncompliance and some showing of actual prejudice resulting from alleged constitutional violations).

The Court in **Wainright v. Sykes, supra,** cautiously avoided denoting a rigid definition of the terms "cause" and "prejudice"; but rather emphasized that although these two terms were the basis of inquiry, "they were not rigid procedural rules that prevented the Writ's fundamental mission -- serving justice --from being realized..." **Murray v. Carrier,** 91 L. Ed. 2d 397, 419 (1986). Beyond that, **Murray v. Carrier** recognizes that "cause and prejudice" must be considered and scrutinized within an overall inquiry into justice, and the Court espoused that this standard assuredly would not become so rigid that it would foreclose a fundamental claim for a miscarriage of justice. **Engle v. Isaac,** 456 U.S. 107 (1982).

Hence, although the "cause and prejudice" test requires a showing by appellant as to a "cause" for failure to appeal and a "prejudice" resulting from the alleged constitutional violations, the inquiry does

not rigidly come to a halt there. Even failure on the burden of showing a "cause" for non-compliance with procedural rules under certain situation allows the granting of a federal habeas corpus writ where a constitutional violation has resulted in a conviction of one who is actually innocent or resulted in a fundamental miscarriage of justice. **Smith v. Murray,** 91 L. Ed. 2d 434, 446 (1986); **Murray v. Carrier,** 91 L. Ed. 2d 397 (1986).

Focusing on the facts of the instant case under the "cause and prejudice" standard, it is the position of Appellant that the reason there were no direct appeals of the convictions were due to the post-conviction change of counsel. That is, present counsel was retained after conviction at the trial level. At the time Appellant retained present counsel, time for timely appeal of the trial decisions had expired. Hence, present counsel sought federal habeas corpus relief under 28 U.S.C. Sec. 2255 and has pursued this procedure up through and including this petition for writ of certiorari. Therefore, it is the position of Appellant that the "cause" for failure of direct appeal of convictions was due to the change of counsel mid-stream at a time wherein appellate counsel was precluded from so doing. There was no attempt at a "deliberate by-pass" of standard appellate procedures but rather the change of counsel precluded pursuit of normal and direct appeal of Appellant's conviction.

The prejudice resulting from the constitutional violations complained of in Appellant's Brief heretofore filed are centered on the conviction of your Appellant by use of perjured testimony of a co-defendant knowingly used by the government and conviction by insufficient evidence as matter of law to so merit such a finding. If the government knowingly used perjured testimony, then Appellant is entitled to relief under 28 U S.C. Sec. 2255. **Hart v. United States,** 565 F.2d 360 (C.A. 5 1978); **United States v. Barklas,** 292 F. 2d 743 (C.A. 2,1961). These alleged errors of perjured testimony, use of such testimony knowingly be the government and insufficiency of the evidence are all directly related to the innocence of Appellant and therefore the burden of demonstrating "cause" and "prejudice" has been met warranting federal habeas corpus relief. **Smith v. Murray,** 91 L. Ed 2d 434 447 (1986).

However, even if this Court does not recognize the obvious

"cause" and "prejudice" asserted by Appellant, then the language of **Smith v. Murray,** supra, and **Murray v. Carrier,** supra, mandate a consideration of the federal writ of habeas corpus relief in view of the fundamental miscarriage of justice had by allowing conviction of Appellant by use of perjured testimony knowingly used by the government or, by the insufficiency of the evidence presented at the trial level.

REASON FOR GRANTING WRIT

Petitioner asserts that a reading of this record clearly demonstrates that the constitutional dimensions of this case and decisions rendered by this very court warrant the granting of the federal habeas corpus relief sought herein, Petitioner has been denied a fair and reasonable opportunity to be heard in the matters herein concerned, and in particular to be allowed to espouse the "cause and prejudice" to which he has been subjected. Although this court has, indeed, spoken to areas surrounding the heart of this appeal, it has never expressed an opinion speaking to the precise issue(s) involved herein.

It further becomes necessary for this Petitioner to request this Honorable Court to grant him any relief that the Court may feel he is entitled to receive.

Respectfully submitted
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ATTORNEYS FOR PETITIONER

by: _____

CERTIFICATE OF SERVICE

On this the ___ day of August, 1987, a true and correct copy of the above and foregoing Writ of Certiorari was served upon Respondent by depositing same in the United States Post Office with postage prepaid addressed to the United States Attorney's Office, Western District of Texas, 655 East Durango Blvd., San Antonio, Texas 78206.

_____

Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1801
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OSCAR L. JIMENEZ,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas
(DR-85-CA-30; DR-85-CR-38-2)

(May 28, 1987)

Before CLARK. Chief Judge, GARWOOD, and HILL, Circuit Judges.

Per Curiam.

After trial by jury, defendant, Oscar Jimenez was convicted of conspiracy to possess cocaine, in violation of 21 U.S.C. _____

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to the rule, the court has determined that this opinion should not be published.

841(a) (1) and 846, and two counts of aiding and abetting the distribution of cocaine, in violation of 841(a) (1) and 18 U.S.C. 2. He was sentenced to 15 years and a special parole term of ten years. Jimenez did not appeal his convictions.

Over a year later, Jimenez filed a motion **pro se** to vacate his sentence pursuant to 18 U.S.C. 2255, alleging that the government knowingly used perjured testimony by a co-defendant at trial. Jimenez also obtained new counsel, who filed a memorandum contending that the evidence at trial was insufficient to sustain the convictions. On May 28, 1986, the magistrate recommended denial without a hearing. On June 27, the district

court noted that no objections to the magistrate's findings and recommendations had been received and denied defendant's petition.

The government contends that this court lacks jurisdiction because the district court's order was filed on June 27, 1986, and defendant's notice of appeal was not filed until November 17, 1986. The court's judgment was not docketed, however, until November 6, 1986. The November 17, 1986 notice of appeal was therefore timely under Fed. R. Civ. P. 4(a)(1). **See** Harcon Barge Co. v. D & G Boat Rentals, Inc., 746 F.2d 278, 281-82 (5th Cir. 1984), **cert. denied,** 107 S.Ct. 399 (1986).

The government urges that Jimenez is barred from seeking 2255 relief because he failed to seek direct appellate review of his convictions. In the absence of a showing of cause and prejudice, a conviction which as not appealed cannot be collaterally reviewed by a motion under 28 U.S.C. 2255. Sincox v. United States, 571 F 2d 876, 879 (5th Cir. 1978). **See also** Davis v. United States, 411 U.S. 233, 93 S.Ct. 1577 (1973) (developing cause and prejudice standard). The record does not disclose and Jimenez does not assert any cause for his failure to appeal his convictions directly. The district court was thus barred from considering the merits of defendant's petition under 2255. The judgment of the district court is

AFFIRMED.